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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ex Parte

William F. Caton, Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

Re: Virtual Collocation Tariff Investigation  
(CC Docket No. 94-97)

Time Warner Communications Holdings, Inc.  
FOIA Request (Control No. 95-223)

Dear Mr. Caton:

On May 1, 1995, Time Warner Communications Holdings, Inc. ("TWComm") submitted a Freedom of Information Act request seeking access to certain cost support data filed with the Commission by Cincinnati Bell Telephone Company ("CBT") as part of its Direct Case submission in response to the February 28, 1995 Order Designating Issues for Investigation in CC Docket No. 94-97, Phase I, the Commission's ongoing investigation of virtual collocation tariffs filed by CBT and other incumbent local exchange carriers. On August 11, 1995, the Chief of the Common Carrier Bureau conditionally granted TWComm's FOIA Request (Control No. 95-223).<sup>1</sup> Both TWComm and CBT thereafter filed Applications for Review of the Bureau's decision, which provided for disclosure of CBT's cost support data in accordance with the terms and conditions of the protective order appended to the Bureau's letter ruling.

<sup>1</sup> See Letter dated August 11, 1995 from Kathleen M.H. Wallman, Chief, Common Carrier Bureau to John L. McGrew, Esq. and associated Protective Order, DA 95-1788, released August 16, 1995.

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The Commission recently released an order disposing of an Application for Review filed by Southwestern Bell Telephone Company ("SWBT"), in response to a November 1, 1994 Common Carrier Bureau letter ruling conditionally granting several FOIA requests for access to cost support data filed by SWBT in connection with the VEIS tariff proceedings.<sup>2</sup> The Commission's order provides for access to SWBT's cost data pursuant to a protective order (the "SWBT Protective Order") which differs in certain respects from the orders appended to the Bureau's letter rulings in the SWBT and CBT FOIA proceedings. It is TWComm's understanding, based on discussions with counsel for CBT, that CBT is now willing to allow access to its cost support data under the terms and conditions established in the SWBT Protective Order, with certain changes designed to accommodate CBT's desire to avoid having to establish a Washington, D.C. location solely for the purpose of providing requesting parties access to the relevant information, as would be required pursuant to Paragraph 8 of the SWBT order.

TWComm continues to believe that the use of a protective order or any other form of restriction on access to the cost support data submitted by CBT in connection with the Commission's VEIS tariff review is neither necessary nor appropriate. However, in order to facilitate the prompt resolution of the Commission's VEIS tariff investigation, which began more than 32 months ago,<sup>3</sup> TWComm is willing to accede to the use of a protective order which provides for access to CBT's cost support data under the terms and conditions specified in the SWBT Protective Order, with the exception of the Washington location requirement described above. It is TWComm's understanding that, in lieu of meeting this requirement, CBT is willing to provide access to the relevant information from a Cincinnati location, and to provide two copies of all such

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<sup>2</sup> See Memorandum and Order, In the Matter of Southwestern Bell Telephone Company on Requests for Inspection of Records, FOIA Control Nos. 94-310, 325, 328, FCC 97-184 (released June 4, 1997).

<sup>3</sup> See Order, Ameritech Operating Companies, et al., CC Docket No. 94-97, DA 94-1421 (C.C.B. released December 9, 1994).

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information to requesting parties within three business days of its receipt of the request. The revised Protective Order appended hereto incorporates the changes to the SWBT Protective Order which TWComm and CBT have agreed to. TWComm and CBT have further agreed that they will withdraw their respective Applications for Review contingent upon entry of an order providing for access to CBT's cost support data pursuant to the terms and conditions contained in the attached Protective Order, in lieu of those specified in the order appended to the Common Carrier Bureau's August 11, 1995 letter ruling.

Accordingly, TWComm respectfully advises the Commission that its August 31, 1995 Application for Review of the Bureau's decision may be deemed withdrawn upon approval of the revised Protective Order attached hereto.

Respectfully submitted,



John L. McGrew  
Counsel for Time Warner  
Communications Holdings,  
Inc.

Attachment

cc: Paul D'Ari  
Christopher Wilson  
Secretary (4 copies)

## PROTECTIVE ORDER

1. On August 11, 1995, the Chief, Common Carrier Bureau issued a letter ruling and protective order conditionally granting a Freedom of Information Act ("FOIA") request by Time Warner Communications Holdings, Inc. ("TWComm") seeking disclosure of cost support data filed by Cincinnati Bell Telephone Company ("CBT") in connection with its virtual collocation service. See Letter dated August 11, 1995, from Kathleen M.H. Wallman, Chief, Common Carrier Bureau to John L. McGrew, Esq. and associated Protective Order, FOIA Control No. 95-223, DA 95-1788, released August 16, 1995. On August 31, 1995, CBT and TWComm filed separate Applications for Review of the Bureau's decision. Subsequently, CBT and TWComm have advised the Commission of their willingness to withdraw their respective Applications for Review contingent upon entry of a revised protective order providing for access to CBT's cost support data under the terms and conditions established in the Commission's recent Memorandum and Order, In the Matter of Southwestern Bell Telephone Company on Requests for Inspection of Records, FOIA Control Nos. 94-310, 325, 328, FCC 97-184 (released June 4, 1997), with certain changes designed to accommodate CBT's desire to avoid having to establish a Washington, D.C. location solely for the purpose of providing requesting parties access to the relevant information. On this date, the Commission is adopting this Protective Order, which incorporates the terms and conditions established in the revised order which CBT and TWComm have agreed to accept as a condition of their withdrawal of the aforementioned applications for review. While TWComm's request for public release under the FOIA is denied, the CBT cost support data must be disclosed to all parties to the virtual collocation tariff proceeding, in accordance with the terms of this order, for the sole purpose of permitting participation in that proceeding. The limitations on disclosure incorporated herein are intended to protect the competitive interests of the parties in this proceeding.

### Definitions

2. The term "party" as used in this Protective Order means any entity that is participating in Federal Communications Commission (Commission) CC Docket No. 94-97 and is seeking access to confidential information, as defined below.

3. For purposes of this Order, "Confidential Information" shall include: (i) information submitted to the Commission by the producing party that has been so designated by the producing party and that the producing party has determined in good faith constitutes trade secrets and commercial or financial information that is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. Section 552(b)(4), and (ii) information submitted to the Commission by the producing party that has been so designated by the producing party and that the producing party has determined in good faith falls within the terms of Commission orders in this proceeding designating items for treatment as confidential. Confidential Information shall also include information specifically designated by the Commission in this proceeding as confidential. The Commission may, sua sponte or upon petition, determine that all or part

of the information claimed by the producing party as “Confidential Information” is not entitled to such treatment.

#### Procedure

4. In filings made in this docket, CBT, the producing party, may designate certain documents and information it produces as “Confidential Information” consistent with the definition of that term in this Protective Order. All such documents and information shall be clearly labeled by CBT to show that the documents are considered “Confidential.”

5. Personnel. (a) Counsel. All Confidential Information produced pursuant to this Protective Order shall be made available to parties solely through counsel for the parties, including in-house counsel, or persons working under the supervision of counsel within the following categories:

(1) Attorneys, including in-house counsel, actively engaged in the conduct of this proceeding, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to assist in the review of tariff support materials and the preparation of documents in the proceeding, and

(2) Any persons requested by counsel of record to furnish technical or other expert services, or otherwise to prepare material for the proceeding, except:

(a) Disclosure shall be prohibited, subject to the limited exception set out in paragraph 5(b) below for deposition witnesses and outside consultants and experts, to persons now engaged, or who reasonably expect they will be engaged, in the purchase of similar or identical equipment, or equipment substitutable in whole or in part for the equipment the prices of which are contained in the cost support data.

(b) For any such person who is in a position to use the information for competitive, commercial, or business purposes, other than those governed by subparagraph (a), disclosure shall be limited to the minimum extent necessary to obtain analysis and management guidelines for participation in this proceeding. In addition, disclosure shall be permitted only upon sworn certification by counsel requesting such disclosure that he or she has used his or her best efforts to obtain personnel who are not in a position to use the information for competitive, commercial or business purposes, and that such personnel do not exist.

(b) Depositions. In the event the Commission orders that depositions may be taken, disclosure is permitted to persons noticed for depositions or designated as witnesses to the extent reasonably necessary to prepare testimony or to outside consultants or experts retained for the purpose of assisting counsel prepare testimony for such depositions. If such persons include those described in paragraph 5(a)(2)(a) above, then disclosure is permitted only upon sworn certification by counsel requesting such

disclosure that he or she has used his or her best efforts to identify personnel with the same or substantially similar knowledge who are not now engaged, or who reasonably expect they will not be engaged, in the purchase of similar or identical equipment, or equipment substitutable in whole or in part for the equipment the prices of which are contained in the cost support data and that such personnel do not exist.

(c) Personnel eligible to have access to Confidential Information pursuant to paragraphs 5(a) or (b) shall not be entitled to review any Confidential Information unless and until they sign Attachment A which states that they shall abide by the terms of the Protective Order.

6. Before a party, through counsel, discloses CBT's virtual collocation cost support data to any person listed in subparts (a) and (b) of paragraph 5(a)(2) who is a competitor (or any employee of, or consultant to, a competitor) of any equipment vendor the prices of which are contained in CBT's virtual collocation cost support data, the party shall give at least ten working days' advance notice in writing (initially via facsimile followed by first class mail, postage prepaid) to counsel for any equipment vendor the data of which are to be disclosed, stating the name and address of the person[s] to whom disclosure is to be made and stating the purpose of such disclosure. The facsimile numbers and addresses to be used for notice to the counsel for the equipment vendors are listed in Attachment B. Copies of the notice should be served on the Commission and all parties of record. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure may not occur until the Commission has denied such motion and all appeals of the Commission denial of such motion are exhausted.

7. Prior to giving access to Confidential Information, as contemplated in Paragraphs 4-6 above, to any person authorized to be given access pursuant to this Order, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Protective Order to such persons, and prior to disclosure, each such person shall agree in writing to comply with and be bound by this Protective Order in the form of Exhibit A, attached hereto. Said counsel shall, at the time of the review of such Confidential Information, or as soon thereafter as practical, deliver to counsel for the party producing the Confidential Information a copy of Attachment A as executed, which shall show each signatory's full name, permanent address and employer, and the party with whom the signatory is associated.

8. CBT shall designate a Cincinnati, Ohio location at which all parties shall be permitted access to and review of requested Confidential Information pursuant to the other terms of this Order. Any such access and review shall be limited to regular business hours after reasonable notice by the requesting party.

9. Within three (3) business days of receipt of a request for information designated by the producing party as Confidential Information, two copies of such Confidential Information will be delivered to the party that requested the information. The

two copies of the Confidential Information shall be provided to the requesting party's counsel of record who has agreed in writing to be bound by this Protective Order.

10. The copies are to be made by, or under the supervision of, the personnel of the party who produced such document, who will affix a stamp to each item to be copied denoting the Confidential designation of the item. The stamp shall be affixed in such a manner that the text of the Confidential Information is not obscured on either the original or any copies thereof.

11. The information produced shall be organized in a manner that clearly identifies each document or portion thereof that is claimed to be Confidential. CBT, the producing party, shall be responsible for producing the Confidential Information in a sealed envelope that is clearly marked on the outside as containing Confidential Information and that clearly specifies the numbers of pages contained therein.

12. Counsel of record for the party authorized hereunder who requested the copies shall sign a statement in the form of Attachment C attached hereto verifying that the sealed envelope clearly marked as containing Confidential Information has been received and designating the name and address of the individual into whose custody the copies shall be delivered. The designated representative of the producing party shall also sign Attachment C and verify to whom the sealed envelope was delivered. Access to said copies shall be limited to those persons defined in Paragraph 5 of this Order. No additional copies shall be made, unless the parties agree otherwise, or upon a showing of a good cause the Commission directs otherwise.

13. Persons that have agreed in writing to be bound by this Protective Order and are therefore permitted access to Confidential Information by this Order may take notes regarding such information as may be necessary in connection with this proceeding. Such notes shall be treated in the same manner as the Confidential Information from which the notes were taken.

#### Storage at the Commission

14. Confidential Information, including that portion of testimony containing references thereto, if filed with the Commission, shall clearly be labeled as Confidential and filed under seal, and shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or, after notice to the parties and hearing, pursuant to the order of the Commission Staff, the Commission, or a court.

#### Good Faith Use of Material

15. All persons having access to the confidential data shall use their best efforts to keep the Confidential Information secure in accordance with the purposes and intent of this Protective Order. To this end, persons having custody of any Confidential Information shall keep the documents properly secured during all times when the documents are not being reviewed by a person authorized to do so.

16. As obtained pursuant to this Order, Confidential Information shall be used exclusively for purposes of participating in this proceeding, including any appeals, and shall not be used or disclosed for any other purpose. The limitation on the use or disclosure of Confidential Information shall be construed to prohibit disclosure orally or in writing or through reproduction or by any other means to anyone not designated under paragraph 5 of all information contained therein. The limitation shall also be construed to prohibit making decisions, participating in any decision making process or rendering advice, legal or otherwise, wherein any information or knowledge derived from said information is used in any manner other than for purposes of this proceeding.

17. Persons obtaining access to Confidential Information under the terms of this order may disclose, describe, or discuss the Confidential Information in any pleading filed in CC Docket No. 94-97, but only if they file both a confidential version and a public version of the pleading under the following procedures:

(a) Confidential Version. (i) Any pleading that includes Confidential Information shall be filed under seal and clearly marked "Contains Confidential Information subject to Protective Order, CC Docket No. 94-97" and covered by a separate letter citing this Order. (ii) Subject to exceptions noted in (iii) below, any pleading containing Confidential Information shall be served only upon the Commission, the producing party, and any vendor the confidential equipment prices of which are reflected in the pleading. (iii) The Confidential Version will not be served on vendors if it contains the confidential equipment prices of more than one vendor. Other parties to this Protective Order may view the Confidential Version under the terms of this Protective Order.

(b) Public Version. Any party filing a pleading that contains Confidential Information shall also prepare a separate public version in which all Confidential Information has been redacted. (i) On the same date that the Confidential Version is filed with the Commission, the party shall hand deliver the Public Version to the producing party and any vendors the equipment prices of which are included in Confidential Information and reflected in the Confidential Version. (ii) The producing party and vendors have five working days following receipt to object in writing to the filing of the Public Version. (iii) If no objections are filed, on the sixth working day following the delivery of the Public Version, the Public Version will be filed with the Commission for inclusion in the public record and will be served on all parties to the virtual collocation tariff review proceeding.



(c) Computation of time. The time for filing responses to both the public and confidential versions of the pleading shall be computed from the day after the filing of the Public Version. See 47 C.F.R. Section 1.4(b) of the Commission's rules.

Returning Material to Producing Party

18. Within thirty (30) days after completion of this proceeding and judicial review, the producing party may request the return of all Confidential Information furnished under the terms of this Protective Order. The Confidential Information must be returned within thirty (30) days after the request. Notes taken with regard to Confidential Information shall be destroyed at the time that Confidential Information is returned, in the presence of the party who produced the Confidential Information if that party so requests. Confidential Information made part of the record in any proceeding shall remain in the possession of the Commission, and, unless otherwise agreed by the party that produced the information or as provided by future order, shall continue to be subject to the protective requirements of this Protective Order.

Other Rights Preserved

19. The signing of the Protective Order shall in no way constitute any waiver of the rights of any party to this protective order to contest any assertion of confidentiality or to appeal any finding that specific information is Confidential Information or should be subject to the protective requirements of this Order. The designation of any information as Confidential Information may be challenged before the Commission, or a court having jurisdiction to review a Commission determination, that said material should be so classified.

20. Disclosure of Confidential Information under this Protective Order shall not be deemed a waiver by either the producing party or the vendors the data of which are contained therein, in any other proceeding, agency, or court, of any privilege or entitlement to confidential treatment. Any parties receiving access to Confidential Information under this Order:

- (a) agree not to assert any such waiver;
- (b) agree not to use information derived from Confidential Information in any proceeding other than this one or for any purpose unrelated to other than this proceeding; and
- (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

21. Nothing contained herein shall limit any party's right to judicial review of any decisions rendered hereunder.

22. Any failure to abide by the terms of its Protective Order may result in the imposition of sanctions, including dismissal of a party's petitions, or censure, suspension, or disbarment of the attorneys involved. See 47 C.F.R. Section 1.24.

23. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. Section 154(i), (j) and 47 C.F.R. Section 0.457(d).

**Attachment A**

**DECLARATION**

In the Matter of

Local Exchange Carriers' Rates,	)	
Terms, and Conditions for Expanded	)	
Interconnection through Virtual	)	CC Docket No. 94-97, Phase I
Collocation for Special Access and	)	
Switched Access	)	

I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party.

(signed)  
(printed name)  
(representing)  
(title)  
(employer)  
(employer)  
(address)  
(address)

(phone)  
(date)  
(date)

**Attachment B**

**NOTIFICATION TO EQUIPMENT VENDORS**

Pursuant to the terms of the Protective Order entered in CC Docket No. 94-97, notice is hereby given to counsel or designated representative of an equipment vendor(s), pursuant to paragraph 6 of the Protective Order to CC Docket No. 94-97, that copies of its equipment prices contained in CBT's confidential virtual collocation cost support data have been disclosed to the person listed below pursuant to paragraph 5(a)(2) or 5(b).

**STATEMENT OF RECEIPT**

I, \_\_\_\_\_, as (COUNSEL OF RECORD) OR (DESIGNATED REPRESENTATIVE) of (insert name of equipment vendor) have received notice that its equipment prices, as contained in CBT's confidential virtual collocation cost support data, have been disclosed to:

Name:

Title:

Representing:

Address:

Facsimile No.:

Signed on this \_\_\_\_\_ day of \_\_\_\_\_, 1997.

Signature

**Attachment C**

**STATEMENT OF RECEIPT**

I, \_\_\_\_\_, as (COUNSEL OF RECORD) OR (DESIGNATED REPRESENTATIVE) of \_\_\_\_\_ (insert name of party) have received the sealed envelope marked "Confidential Information" for the purpose of making copies of said confidential information, pursuant to paragraph 12 of the Protective Order. These copies are to remain in the custody of:

Name:

Title:

Address:

Signed on this \_\_\_\_\_ day of \_\_\_\_\_, 1997.